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No. 418

In the Supreme Court of the United States

OCTOBER TERM, 1938

A. B. HALE, AS CHAIRMAN, AND E. A. McCOISKEY ET AL., ETC., APPELLANTS

v.

BIMCO TRADING, INC., AND BROWARD COUNTY PORT AUTHORITY

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA

BRIEF OF THE UNITED STATES AS AMICUS CURIAE

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OPINION BELOW

The District Court for the Northern District of Florida filed no opinion.

JURISDICTION

The final decree of the District Court was entered on June 14, 1938 (R. 66–67). The order allowing an appeal to this Court was entered on September 6, 1938 (R. 70–71). The jurisdiction of this Court is invoked under Section 266 of the Judicial Code (28 U. S. C. 380).

QUESTIONS PRESENTED

The state statute imposes standards for cement but requires inspection and exacts an inspection fee only when the cement is imported from a foreign country. The questions are:

1. Whether the statute is valid under the commerce clause, Article I, Section 8, Clause 3, of the Constitution?

2. Whether the statute is valid under the imports clause, Article I, Section 10, Clause 2, of the Constitution?

STATUTE INVOLVED

The Florida statute, ch. 18995 of the Laws of 1937, is set out in the Appendix, *infra*, pp. 39–43.

STATEMENT

This suit was commenced by appellee Bimco Trading, Inc.,[1] in the United States District Court for the Northern District of Florida on November 4, 1937 against appellants, as and constituting the State Road Department of the State of Florida. It attacked as unconstitutional an act [2] of the State of Florida which provided, among other things, for the inspection of all imported cement and required the payment of a fee of fifteen cents per hundred pounds for such inspection. A temporary restrain-

[1] Appellee Broward County Port Authority was subsequently permitted to intervene as a party plaintiff (R. 55–63).

[2] Chap. 18995, Acts 1937, Comp. Gen. Laws of Florida, Chap. CVIII, secs. 4151 (512)–(519).

ing order was denied on November 9, 1937 (R. 38), and on the same day an order was entered convoking a statutory three-judge court (R. 38–40). Appellants, defendants below, filed a motion to dismiss the bill of complaint on November 24, 1937[3] (R. 40–41).

The fourth ground of the motion to dismiss sought to invoke Section 265 of the Judicial Code on the ground that "the granting of an injunction as prayed would have the effect of staying the proceeding now pending in the Supreme Court of Florida." The facts in this connection are as follows: A petition for mandamus was filed in the Supreme Court of Florida on July 29, 1937, by the State of Florida, *ex rel.* Florida Portland Cement Company, against appellants here, to compel execution of the statute now under consideration (R. 36). An alternative writ of mandamus was issued that day (R. 10–14, 36). Appellants filed a demurrer to the writ (R. 15–17), and after argument the Supreme Court of Florida, on October 12, 1937, entered an order overruling the demurrer (R. 17–18), and allowing appellants ten days in which to file an answer or return. An opinion was delivered by the Court on the same day (R. 18–30). See *State* v. *Hale,* 129 Fla. 588, 176 So. 577. The

[3] The original bill of complaint was amended on January 6, 1938 (R. 65), and the parties stipulated that the motion to dismiss the original bill should stand as to the amended bill (R. 64).

record as supplemented by the order of this Court of January 30, 1939, further shows that on November 19, 1937, the Supreme Court of Florida issued a peremptory writ of mandamus against appellants and that on December 9, 1937, the Supreme Court of Florida stayed further proceedings and actions pursuant to the writ of mandamus pending final decision by this Court.

On November 27, 1937, a hearing was held on the application of appellee Bimco Trading, Inc., for an interlocutory injunction (R. 54). In support of its application appellee Bimco Trading, Inc., filed affidavits showing that the customary charge of commercial testing laboratories for making engineering tests and chemical analyses of cement was about one and one-half or two cents per barrel—a barrel containing four bags or three hundred and seventy-six pounds of cement (R. 42–43, 44). The affidavit of P. H. Bates of the National Bureau of Standards was submitted in which he stated that the records of the Bureau showed that the actual cost of making examinations and tests according to established government standards of quality ranged from five cents per barrel for small lots of cement (of four hundred barrels or less) to a minimum of one and one-half cents per barrel for larger lots (R. 45–47). The effect of the statutory charge of fifteen cents per hundred pounds was shown by an affidavit setting forth the fact that appellee then had a cargo of cement on

the high seas en route to this country and inspection under the statute would cost seven thousand three hundred dollars as contrasted with the customary commercial rate of about fifteen dollars (R. 43–44).

Appellee also submitted to the District Court an affidavit of the Honorable Cordell Hull, Secretary of State, which set forth the following facts (R. 47–54): The Belgian Government has protested to the United States against the Florida statute on the ground that it violated the spirit of the Belgian Trade Agreement, concluded on February 27, 1935, pursuant to the so-called Trade Agreements Act which amended the Tariff Act of 1930 (48 Stat. 943, 19 U. S. C. 1351). That agreement granted a reduction of one and one-half cents per hundred pounds in the customs duty applicable to cement imported from Belgium or Luxemburg. In return for that and other concessions and assurances granted by the United States, the Belgo-Luxemburg Economic Union granted important advantages to the industrial and agricultural interests of the United States. The fee imposed by the Florida statute amounts to three and one-third times the customs duty currently levied by the Federal Government on cement imported from abroad and is equivalent to an additional duty of approximately thirty-five per centum *ad valorem* on such cement. If the statute were upheld, the foreign commerce of the United States would be substantially ob-

structed because approximately twenty-one per centum of all the cement imported into the United States enters at Florida ports.

After hearing and argument, in which the United States participated as *amicus curiae*, the specially constituted District Court on November 27, 1937 entered its order granting an interlocutory injunction (R. 54–55), and on December 9, 1937, issued its writ (R. 63–64). No appeal was taken from that order.

On March 8, 1938, the District Court denied appellants' motion to dismiss the bill of complaint and allowed them thirty days in which to answer (R. 65). Appellants refused to plead further and on June 14, 1938, the District Court, on motion, entered a default and final decree upon the bill of complaint taken as confessed (R. 66–67). From this final decree appellants prosecuted the present appeal (R. 67–68, 70–71).

STATEMENT OF THE INTEREST OF THE UNITED STATES

1. The United States submits this brief as *amicus curiae* because the Florida statute in question here raises issues of great public importance and threatens substantially to impair and obstruct the execution of powers conferred upon the Federal Government by the Constitution. The importance of this statute, in so far as its effect on the foreign relations of the United States is concerned, is indicated by the affidavit of the Secretary of State and

by the fact that the Belgian Government has protested against it. The importance of the statute, in so far as its effect on foreign commerce of the United States is concerned, is manifest from the fact that the so-called inspection fee amounts to three and one-third times the customs duty currently levied by the Federal Government on imported cement and is equivalent to an additional duty of approximately thirty-five percent *ad valorem* on such cement.

If the State of Florida is successful in imposing this inspection fee, it is to be anticipated that other States by similar devices will exclude other commodities now imported in foreign commerce. Whatever form those statutes may take, their practical effect will be to levy import duties upon foreign commodities and in some cases to impose a virtual embargo upon the importation of those commodities. In that event, import duties, instead of being uniform as contemplated by the Constitution, will vary from State to State. It needs no argument to show the difficulties which will confront the Department of State in its efforts to negotiate trade agreements pursuant to the congressional policy embodied in the Trade Agreements Act if those agreements may be nullified and impaired by legislative action of the various States. Congress doubtless has the power to eliminate the discriminations against and obstructions to foreign commerce which would be found in such statutes, but there is

no occasion to impose on that body the duty of condemning legislation which is forbidden by the Constitution itself. In this case, as in the countless earlier cases in which the Court has enforced the mandate of the commerce clause, the silence of Congress can have but one interpretation—the intention that commerce be free. It would be difficult to contrive congressional legislation which would preclude in advance all the forms that obstructive legislation might take; an *ad hoc* condemnation of the statutes after enactment would be an intolerably slow and unsatisfactory arrangement. Because the effectiveness of the obligations of our commercial treaties would turn upon the contingency of subsequent legislation, foreign nations could not but hesitate before entering into mutual agreements of this nature.[4] Indeed, it is perhaps not too much to say that the power of the United States to enter into international agreements and to conduct its foreign commercial relations in an orderly way is at stake. With this in mind, we might appropriately recall to the Court the language of Chief Justice Marshal in *Brown* v. *Maryland*, 12 Wheat. 419, 444–446:

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[4] The brief of appellants, indeed, seems to suggest that "the Revision and Controul of the Congress" provided by Section 10 of Article I extends only to the amount of the inspection fees (Br. 20–21). If this were the case, and Congress could not eliminate discriminations and obstructions, statutes such as that in question could work a complete and permanent frustration of the national trade policies.

* * * The oppressed and degraded state of commerce, previous to the adoption of the constitution, can scarcely be forgotten. It was regulated by foreign nations, with a single view to their own interests; and our disunited efforts to counteract their restrictions, were rendered impotent, by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the federal government to enforce them had become so apparent, as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted, whether any of the evils proceeding from the feebleness of the federal government, contributed more to that great revolution which introduced the present system, than the deep and general conviction, that commerce ought to be regulated by congress. It is not, therefore, matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the states. To construe the power so as to impair its efficacy, would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity.

2. The interest of the United States, as *amicus curiae*, would not ordinarily extend to the procedural problems of a particular case. Since, however, it is desirable that persons have access to the federal courts to attack state legislation which contradicts national commercial policies, it may not be amiss if we suggest two points with respect to the objections of appellants based on Section 265.

First, it hardly can be thought that Section 265 operates in these circumstances. According to the argument of appellants, if there be an initial period of inaction by the officers charged with enforcement of the statute, the State may proceed by mandamus in its own courts, and if the state court adds its voice to the voice of the legislature in imposing the duty on the officers, all persons are then barred from seeking to protect their constitutional rights by way of injunction in the federal courts. The state officers are not apt to seek review by this Court, if indeed they could, of the state court decision in the mandamus action. That proceeding should therefore not result in a complete ouster of the jurisdiction of the federal courts to give equitable relief against the challenged statute. Especially since Section 265 is not jurisdictional but merely expresses a rule of comity, designed to avoid unseemly conflicts between state and federal courts in the course of simultaneous proceedings (*Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175; *Smith* v.

Apple, 264 U. S. 274) it should not be construed to lead to such an anomalous result.

The only cases which we have found that are directly in point are *Bank of Kentucky* v. *Stone*, 88 Fed. 383 (C. C. Ky.), decided by Circuit Justice Harlan and Circuit Judges Taft and Lurton, affirmed by divided court, *Stone* v. *Bank of Kentucky*, 174 U. S. 799, and *Everglades Drainage Dist.* v. *Florida Ranch & D. Corp.*, 74 F. (2d) 914 (C. C. A. 5th). In each case, on facts closely comparable to those at bar, the court held that a mandamus action in the state court did not under Section 265 bar an equity suit to enjoin the action in a federal court.

SUMMARY OF ARGUMENT

I

It is evident on the face of the Florida statute that it discriminates against foreign commerce; the inspection and the payment of the fee, 15 cents per 100 pounds, is required only in the case of foreign commerce.

Few propositions are better settled than the rule which forbids discrimination against interstate commerce, whether the discrimination take the form of taxation or police regulation. The rule has been held equally applicable to foreign commerce.

A settled exception to the prohibition of the commerce clause against direct burdens on interstate

or foreign commerce is that which permits the State to impose inspections or regulations, and to collect fees or charges to recompense itself for their cost. It is, however, inapplicable here, because the commerce clause inspection fee to be valid can be neither discriminatory nor excessive in amount; this inspection law is condemned on both grounds.

II

The argument that the imports clause does not invalidate the statute, even if correct, offers no escape from the prohibition of the commerce clause. However, the history of the imports clause in the Federal Convention and the decisions of this Court unite to show that the statute is also invalid under this clause. It is discriminatory and its fees are more than are "absolutely necessary" to enforce the act. So, regardless of the fact that the Florida legislature legislation has called this an inspection law, this Court must declare the statute unconstitutional.

ARGUMENT

I

THE FLORIDA STATUTE IS INVALID BECAUSE IT IMPOSES AN UNDUE AND DISCRIMINATORY BURDEN ON FOREIGN COMMERCE

In the following discussion we shall show (a) that the Florida statute discriminates against foreign commerce and in favor of domestic commerce, and (b) that this discrimination, as well as the ex-

and (b) that this discrimination, as well as the excessive fees imposed, are forbidden by the commerce clause, which gives to Congress alone the power "to regulate Commerce with foreign Nations".

A. The Act Discriminates Against Foreign Commerce

It is evident from the face of the Florida statute (*infra*, p. 39) that it discriminates against foreign commerce. The preamble opens, frankly enough, with the explanation that "during the past twelve months approximately thirty per centum (30%) of all cement sold and used in Florida was manufactured in foreign countries and imported and brought into the State of Florida." Section 1, it is true, prescribes a standard of quality of general application. But there is to be inspection only of the foreign cement imported into Florida,[5] and only the imported cement is to pay the inspection fee of 15 cents per hundredweight (Sec. 2).

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[5] It cannot be argued that Section 3, providing generally for enforcement of the Act by the State Road Department, means that the Department is to enforce the general standard of Section 1 against domestic cement, thus removing some part of the discrimination against foreign commerce. In the first place, no means of enforcement are provided. Moreover, Section 3 also provides that the Department shall expend in its enforcement of the statute only the moneys collected under its provisions. Since the only fees provided are those resulting from the inspection of imports, this argument would serve only to introduce a second form of discrimination.

The complaint makes plain the extent of this discrimination.[6] The imported cement sells for $1.60 per barrel; the inspection charge would be 57 cents per barrel, and sale in a market where the domestic competitors were exempt would be impossible. The charge would amount to $9,000 per cargo, in place of the $15 now charged under the customary method of commercial inspection (R. 2–3). The size of the fee, and its impact upon the foreign commerce and the foreign relations of the United States, are graphically shown when the Florida fee of 15 cents per hundred pounds is compared with the duty of 6 cents per hundred pounds which was set in the Tariff Act of 1930 (19 U. S. C., Sec. 1001, par. 205b) and which was reduced to 4½ cents by the Belgian Trade Agreement of 1935 (49 Stat. 3680, 3691).

This discriminatory burden on foreign commerce cannot be justified. The Act advances two reasons. One, that the importation "amounts to unfair competition being forced on this great industry[7] in Florida", carries its own indictment of the statute

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[6] This appeal was taken from a default decree entered after the denial of appellants' motion to dismiss. The only question before this Court is whether or not the bill of complaint states a cause of action. In determining that question the allegations of the bill must be considered as true. *Polk Co.* v. *Glover*, 305 U. S. 5, 9; *Postal Telegraph-Cable Co.* v. *Taylor*, 192 U. S. 64.

[7] In fact, the Florida Portland Cement Company, at Tampa, is the only concern in the State which manufactures cement (R. 3).

and indicates that the legislation might in truth have been designed as a local protective tariff.

The second reason, as explained by the preamble, is that, because of the large numbers of dwelling houses and public buildings constructed with the use of cement, "it is of paramount importance to the public safety that only cement measuring up to a minimum standard should be offered for sale, sold or used in the State of Florida." But, quite plainly, if there be this paramount public interest in the quality of cement, it would extend to inspecting the 70 per cent of all cement sold which is of domestic manufacture as well as the 30 per cent which is imported.

The declaration in the preamble that "much of the foreign manufactured cement imported and brought into the State of Florida has been of inferior quality" cannot serve to justify the discrimination. We do not suggest that the finding was not made in good faith. We do not suggest, at least with this state of the record,[8] that the finding may not have basis in fact. We do insist that, even if the foreign manufactured cement were apt to be inferior in quality, which is shown by this record not to be the case,[9] no legislative finding of administrative convenience, which alone could serve as a proper explanation of the classification, can justify

[8] See *Foster Packing Co.* v. *Haydel*, 278 U. S. 1, 10.

[9] The cement imported by the plaintiff must be taken to be of the highest quality sold in Florida (R. 2).

such a burdensome discrimination against foreign commerce. Any administrative inconvenience which may result from the prohibition against classifications which unduly discriminate against interstate and foreign commerce is a small price to pay for the advantages of being a single nation.

B. A State May Not Discriminate Against Interstate or Foreign Commerce

1. *The General Rule.*—The succeeding discussion deals largely with cases which involve discrimination against interstate commerce rather than foreign commerce. But foreign commerce is plainly entitled to at least the same protection as that given interstate commerce under the power of Congress "to regulate Commerce with foreign Nations and among the several States." It has never been suggested, so far as we know, that the prohibitions implied by the commerce clause are not fully applicable to foreign commerce. The Court, in any event, has settled the question in *Cook* v. *Pennsylvania,* 97 U. S. 566, 573. There it held that the prohibition of the commerce clause, announced in cases which condemned legislation discriminating against interstate commerce, applied equally to discriminations against foreign commerce.

The guiding principles stem from *Brown* v *Maryland,* 12 Wheat. 419, 448, where the Court said that "Any charge on the introduction and incorporation of the articles into and with the mass of property in the country, must be hostile to the power

given to congress to regulate commerce * * *." Since that decision it has been almost beyond dispute that no State could direct a tax or regulation at interstate or foreign commerce alone. The teaching of the cases is unmistakable.[10]

The rule against discrimination was applied, for example, in *Welton* v. *State of Missouri,* 91 U. S. 275, where the Court held a statute invalid which required a license from peddlers selling goods not produced in the State. Otherwise, it said (p. 281), "all the evils of discriminating State legislation, favorable to the interests of one State and injurious to the interests of other states and countries, which existed previous to the adoption of the Constitution, might follow * * *." Similarly, in *Guy* v. *Baltimore,* 100 U. S. 434, the Court held invalid an ordinance, enacted pursuant to legislative authority, which excepted vessels carrying the produce of Maryland from the wharfage charged at the municipal wharves. The controlling rule was succinctly stated by Justice Harlan, writing for the Court (p. 439):

> no State can, consistently with the Federal Constitution, impose upon the products of

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[10] See, in addition to the cases discussed in the text, *Ward* v. *Maryland*, 12 Wall. 418; *Tiernan* v. *Rinker*, 102 U. S. 123; *County of Mobile* v. *Kimball*, 102 U. S. 691, 697; *Webber* v. *Virginia*, 103 U. S. 344; *Walling* v. *Michigan*, 116 U. S. 446; *Scott* v. *Donald*, 165 U. S. 58, 101; *Vance* v. *W. A. Vandercook Co. (No. 1)*, 170 U. S. 438, 449–450; *Darnell & Son* v. *Memphis*, 208 U. S. 113.

other States, brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other States, more onerous public burdens or taxes than it imposes upon the like products of its own territory.

2. *The Commerce Clause Inspection Cases.*—Appellants do not discuss the commerce clause, but it may be supposed that they would seek to justify the Florida statute as an inspection law. It has, of course, long been established that a State, to protect the health and welfare of its citizens may impose inspections or regulations under what has been called its police power, and may also collect fees or charges to recompense itself for the cost of this regulation or for the cost of facilities used in the commerce. This exception to the implied prohibitions of the commerce clause has become settled with respect both to interstate [11] and to foreign [12] commerce.

This exception can, however, have no application here. The general rule forbidding discrimina-

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[11] *Wharf* v. *Bingaman*, 298 U. S. 407, 410; *Clyde Mallory Lines* v. *Alabama*, 296 U. S. 261, 268; *Postal Tel.-Cable Co.* v. *Richmond*, 249 U. S. 252; *Pure Oil Co.* v. *Minnesota*, 248 U. S. 158; *Foote* v. *Maryland*, 232 U. S. 494; *Savage* v. *Jones*, 225 U. S. 501, 528; *Red "C" Oil Co.* v. *North Carolina*, 222 U. S. 380, 391–393; *Western Union Tel. Co.* v. *New Hope*, 187 U. S. 419; *Patapsco Guano Co.* v. *North Carolina*, 171 U. S. 345; *Packet Co.* v. *Keokuk*, 95 U. S. 80.

[12] *Morgan* v. *Louisiana*, 118 U. S. 455; see *Clyde Mallory Lines* v. *Alabama*, *supra*; *Patapsco Guano Co.* v. *North Carolina*, *supra*, 351.

tion against interstate commerce operates in the field of inspection laws just as it does with respect to other state legislation. In addition, the Florida statute is invalid because the inspection fee is excessive.

3. ***A Discriminatory Inspection Law is Invalid.***— We have already shown that the Florida statute is grossly discriminatory in its operation, favoring domestic commerce and crippling or destroying foreign commerce (*supra*, pp. 13–16). This means it cannot be saved on the theory that it is a police regulation to ensure safety, while the fee of 15 cents per hundredweight is designed merely to recompense the State for the cost of its administration. None of the cases in which such an act has been sustained dealt with a discriminatory measure.[13] Many of the decisions expressly state the rule as applicable only to nondiscriminatory regulations or charges.[14]

These dicta and negative implications are amply borne out in unequivocal decisions of the Court.

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[13] Any discrimination in the statute considered in *McLean* v. *Denver & Rio Grande R. R. Co.*, 203 U. S. 38, discussed *infra*, pp. 23–24, was viewed as insubstantial by the Court.

[14] *Dixie Ohio Express Co.* v. *State Revenue Commission*, No. 260, this Term; *Morf* v. *Bingaman*, *supra*, 410; *Interstate Transit, Inc.* v. *Lindsey*, 283 U. S. 183, 186; *Interstate Busses* v. *Holyoke Ry.*, 273 U. S. 45, 51; *Hendrick* v. *Maryland*, 235 U. S. 610, 612; *Savage* v. *Jones*, *supra*, 524; *McLean* v. *Denver & Rio Grande R. R. Co.*, *supra*, 54; *Patapsco Guano Co.* v. *North Carolina*, *supra* 357; *Woodruff* v. *Parham*, 8 Wall. 123, 140.

In several cases state laws, which otherwise would have been a valid exercise of the police powers, have been held unconstitutional because they discriminated against interstate commerce.

Railroad Co. v. *Husen,* 95 U. S. 465, held invalid under the commerce clause a Missouri statute which forbade the entry of Texas, Mexican or Indian cattle between March and November of each year. The State, it was held, could "no more prohibit or regulate that [commerce] which is inter-state than it can that which is with foreign nations", and the act must fall because "The object and effect of the statute are, therefore, to obstruct inter-state commerce, and to discriminate between the property of citizens of one State and that of citizens of other States" (pp. 469, 470).

A Virginia statute rather closer to that now in question was considered in *Voight* v. *Wright,* 141 U. S. 62. It required inspection of all flour brought into the State and offered for sale, but did not require the inspection of flour manufactured in Virginia. A fee of two cents per barrel was provided to defray the costs of inspection. This Court, without discussing the inspection fee, held that the mere requirement of inspection was invalid, because (p. 66):

> The law in question is a discriminating law, and requires the inspection of flour brought from other States, when such inspection is

not required for flour manufactured in Virginia.

The Court has reached the same result in cases where the state statute did not in terms discriminate against interstate commerce, but did so as a necessary result. In *Minnesota* v. *Barber,* 136 U. S. 313, the Court considered a statute which required all cattle, sheep and swine slaughtered for human food to be inspected, in Minnesota, within 24 hours before their slaughter. The effect of the statute was virtually to exclude from the Minnesota market all meat taken from animals slaughtered in other States; it was accordingly held to be an unconstitutional burden on interstate commerce. A somewhat similar statute of Virginia made it unlawful to sell in the State meat taken from animals slaughtered 100 miles or more from the place at which the meat was offered for sale unless the meat had been inspected and approved by state inspectors; an inspection fee of one cent per pound was to be charged. It was held invalid in *Brimmer* v. *Rebman,* 138 U. S. 78. This Court said (p. 82):

> Undoubtedly, a State may establish regulations for the protection of its people against the sale of unwholesome meats, provided such regulations do not conflict with the powers conferred by the Constitution upon Congress, or infringe rights granted or se-

> cured by that instrument. But it may not, under the guise of exerting its police powers, or of enacting inspection laws, make discriminations against the products and industries of some of the States in favor of the products and industries of its own or of other States.

The *Barber* and *Rebman* cases also serve to make clear that no declaration of the legislature as to the purposes of preserving the health or safety of the residents of the State will justify a discrimination against interstate or foreign commerce. The Court in the *Barber* case, speaking of the argument that inspection was adequate only before slaughter, said that if this were true "it would not follow that a statute like the one before us is within the constitutional power of the State to enact" (136 U. S. at 321). It said, in the *Rebman* case, that "The recital in the preamble that unwholesome meats were being offered for sale in Virginia cannot conclude the question of the conformity of the act to the Constitution" (138 U. S. at 81; see also p. 83).

Perhaps the case most closely in point is one recently decided by the New Hampshire court when it considered a proposed statute similar in all essential respects to that here involved. In *Opinion of the Justices,* 87 N. H. 496, it unhesitatingly condemned a bill requiring that bread and pastry made in a foreign country must be inspected and sold

under a license, while domestic bread and pastry was not so regulated.[15]

The Supreme Court of Florida has sustained the statute in *State ex rel. Florida Portland Cement Co.* v. *Hale*, 129 Fla. 588.[16] The court gave only incidental attention to the operation of the commerce clause, as opposed to the imports clause, but seems to have based its decision under the commerce clause on *McLean* v. *Denver & Rio Grande R. R. Co.*, 203 U. S. 38. That case offers no support to the legislation here under attack. New Mexico, to discourage the theft of cattle (generally identified by brand marks) enacted a comprehensive series of statutes. Butchers were required to keep a record of animals slaughtered, they and all other persons

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[15] The court said (p. 499):

"The bill seeks to place burdens on the business of dealing in and selling bread and pastry made in and imported from a foreign country. If the products are made locally or in another state, they are free from the burdens. No reason suggests itself why, in the interest of public health or in other public concern, bread and pastry made in a foreign country should be inspected and sold under license while that made in this country has no need of such regulation. The purpose of the bill to discourage the importation from another country of these products is reasonably apparent. * * *

"The result is that the bill is considered to propose fatally defective legislation. By its discriminatory features it will amount to a direct regulation of foreign commerce in placing it under restrictions not applicable to other commerce in the same kind of property. * * *"

[16] The opinion is included in the present record (R. 18–30).

were required to keep the hides for 30 days to permit inspection, and a board of inspectors were to inspect slaughter houses and to report on the number of cattle slaughtered, the names of the sellers and the brand marks; an inspection fee of 3 cents was required. The act which was assailed forbade any carrier to accept for transportation beyond the territory hides which had not been inspected and tagged; a fee of 10 cents was charged for this inspection. (203 U. S. at 51–53.) The Court held that the statute was plainly designed to prevent theft and that, in view of the other statutes applicable to hides which were not shipped outside the State, there was no arbitrary discrimination against interstate commerce. Such a conclusion could not be reached with respect to the Florida statute which is here involved; the inspection and the fee relate only to cement in foreign commerce.

It seems plain enough that Florida, whatever the purposes of the legislation, must proceed within the limits set by the commerce clause. If the legislature wishes to insure against the use of inferior cement, it must make its inspection laws applicable to domestic as well as to imported cement; any other result would stifle foreign trade, the regulation of which is committed to Congress alone.

4. *An Inspection Law With Excessive Fees Is Invalid.*—It is thoroughly settled that, while the commerce clause permits inspection fees and other charges designed only to reimburse the State for

the administration of its police laws or commerce facilities,[17] these fees and charges are invalid if they exceed the reasonable cost of performing the services.[18] These decisions are applicable to invalidate the Florida statute for either of two reasons. (1) The most important of these reasons is that the admitted facts[19] charge that the fee is 60 times the actual cost of inspection under the provisions of the act and 600 times the necessary and customary cost of inspection (R. 3). (2) These facts are conclusive, but it might also be suggested that the statute in Section 3 provides that the cost of its enforcement is to be paid out of the fees collected, but it is nowhere provided that the fees collected are to be used only for this purpose. It necessarily follows that the fees collected, if there be an excess, must be paid into the general treasury. This intermingling with the general funds places the burden on the State to justify the exaction as reasonably necessary for the administration of the law.[20]

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[17] See the cases cited in footnotes 11, 12, and 14, *supra*.

[18] *Steamship Co.* v. *Portwardens*, 6 Wall. 31; *Atlantic &c. Tel. Co.* v. *Philadelphia*, 190 U. S. 160; *Postal Telegraph-Cable Co.* v. *New Hope*, 192 U. S. 55; *Postal Telegraph-Cable Co.* v. *Taylor*, 192 U. S. 64; *Phipps* v. *Cleveland Refining Co.*, 261 U. S. 449; *Interstate Transit, Inc.* v. *Lindsey*, 283 U. S. 183; *Ingels* v. *Morf*, 300 U. S. 290; *Great Northern Ry.* v. *Washington*, 300 U. S. 154.

[19] See footnote 6, *supra*.

[20] If, as the state court held (R. 23), "the net surplus must be accounted for to the Treasury of the United States", the result is not affected. There has been an intermingling of

Great Northern Ry. v. *Washington,* 300 U. S. 154, 162; *Ingels* v. *Morf,* 300 U. S. 290, 294, 296. This burden, of course, has not been met by the State.

It results that the burdensome charge of 15 cents per 100 pounds of cement cannot be sustained on the theory that it serves only to reimburse the State for a nondiscriminatory inspection which only incidentally affects foreign commerce. Failing that justification, it remains an unwarranted interference with and a direct burden on foreign commerce, and must therefore be held invalid.

II

THE FLORIDA STATUTE IS NOT MADE VALID BY THE IMPORTS CLAUSE BUT IS, INDEED, PROHIBITED BY THAT CLAUSE

We have shown that the statute in question is invalid because it is an undue and discriminatory burden on foreign commerce. Appellants argue that the act is valid under the imports clause. That clause, Article I, Section 10, Clause 2, provides:

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treas-

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the funds prior to this accounting, and, so far as the commerce clause is concerned, this is sufficient to require the State to justify the amount of the fee.

> ury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

1. It is necessary, before discussing the operation of the imports clause in detail, to point out that even if appellants were to carry their argument that the fee is not prohibited by the imports clause, it would not follow that the act would be valid. The imports clause is not an exception from the prohibitions latent in the commerce clause, but an additional prohibition. Thus, taxes which are valid under the commerce clause, such as nondiscriminatory property taxes on goods in their original package or privilege taxes on their sale, are nonetheless invalid when applied to goods imported from foreign countries.[21] *Low* v. *Austin,* 13 Wall. 29, 34; *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500, 519–520; *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506, 509–512; compare *Brown* v. *Maryland,* 12 Wheat. 419, with *Woodruff* v. *Parham,* 8 Wall. 123. Since the imports clause is a second rather than the only limitation upon state power with respect to foreign commerce, the statute is not sustained merely by showing it to be valid under that clause.

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[21] While there are contrary intimations in *Brown* v. *Maryland*, 12 Wheat. 419, 449; *Voight* v. *Wright*, 141 U. S. 62; and *Foote* v. *Maryland*, 232 U. S. 494, 503, it is settled that the imports clause is directly applicable only to foreign commerce. *Woodruff* v. *Parham*, 8 Wall. 123; *Coe* v. *Erroll*, 116 U. S. 517; *Patapsco Guano Co.* v. *North Carolina*, 171 U. S. 345, 350; *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506.

We shall, however, show that the statute is also invalid under the imports clause.

2. The clause is more complex and rather more obscurely worded than in the case of most of the other constitutional provisions. Its proper interpretation, accordingly, requires to an unusual degree that attention be paid to its genesis in the Federal Convention.

The earlier drafts of the Committee of Detail, whose work was undertaken during an adjournment of the Convention,[22] contained an absolute prohibition against a State laying a duty on imports.[23] The Committee's final report, submitted on August 6, forbade such legislation "~~until the~~ Legislature of the United States ~~can be consulted~~."[24] When the clause was discussed in convention it was twice amended. A motion to extend the prohibition to exports was carried by a bare margin.[25] In addition, Madison moved that the prohibition be made absolute, since the importing States might act in Congress to extend consent to the state import

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[22] Farrand, *Records of the Federal Convention*, I, xxii.

[23] Draft III (Farrand, 2, 135): "The S. & H. D. in C. Ass. shall have the exclusive Power of * * * levying Imposts." Draft IV (Farrand, 2, 143): "no State to lay a duty on imports". Draft IX (Farrand, 2, 169): "No State shall * * * lay any Imposts or Duties on Imports".

[24] Farrand, 2, 187. The clause itself was not changed but the consent of the national legislature was made to modify the whole of Article XIII.

[25] Farrand, 2, 442. The vote was 6 states to 5.

duties; after Sherman declared he thought Congress could be trusted the motion was defeated.[26] Sherman, apparently to soften the fears of Madison, then moved that the revenues derived from such imposts, if Congress consented, be paid to the United States.[27] Madison and Morris favored the regulation as effectually preventing imposts; others opposed for the same reason, but it was carried.[28] The Committee of Style reported the clause in substantially the form to which it had been amended in convention.[29] On September 12 Mason of Virginia moved to reconsider, because the prohibition of a duty on exports would ruin the "Staple States," which had a thoroughgoing scheme of state inspection and warehousing of their export commodities; he accordingly proposed a rather complex amendment to accomplish his purpose.[30] Madison saw no harm, and added, significantly, that the commerce clause would serve to prevent abuse; to the fears of other members that abuses might arise from the

[26] Farrand, 2, 441. The vote was 4 states to 7.

[27] The motion was to add "nor with such consent but for the use of the U. S." Farrand, 2, 442.

[28] Farrand, 2, 443. The vote was 9 states to 2.

[29] Farrand, 2, 577. See, also, the report of September 12, Farrand, 2, 597.

[30] Farrand, 2, 588. The amendment was: "provided nothing herein contained shall be construed to restrain any State from laying duties upon exports for the sole purpose of defraying the Charges of inspecting, packing, storing and indemnifying the losses, in keeping the commodities in the care of public officers, before exportation."

provision he replied: "There will be the same security as in other cases—The jurisdiction of the supreme Court must be the source of redress."[31] The amendment, revised to permit Congress to control the inspection laws, was adopted the following day.[32] On September 15, the Convention "In consequence of the proviso moved by Col. Mason," adopted a substitute provision which was carried without change into the Constitution as adopted.[33]

From this history of the clause four conclusions emerge: (1) The imports clause was primarily designed to give a certain protection, in addition to that of the commerce clause, against the seaport States laying tribute on those States which could not themselves import goods.[34] (2) The provision that "the net produce shall be for the use of the treasury of the United States" was intended to be applica-

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[31] Farrand, 2, 588–589. He was, however, not at that time sure the Court had power to declare state acts invalid (*id.*, 589).

[32] Farrand, 2, 605. The amendment, adopted by a vote of 7 states to 3, read: "Provided that no State shall be restrained from imposing the usual Duties on produce exported from such State, for the sole purpose of defraying the charges of inspecting, packing, storing, and indemnifying the losses on such produce, while in the custody of public Officers: but all such regulations shall, in case of abuse, be subject to the revision and controul of Congress."

[33] Farrand, 2, 624.

[34] See, e. g., in the Convention, Madison (Farrand, 2, 441, 442) and Morris (*ibid.*, 442); Madison's unfinished preface to the debates (*ibid.*, III, 547–548); *Cook* v. *Pennsylvania*, 97 U. S. 566, 574.

ble only when the Congress had given its consent to the impost or duty. (3) The inspection laws contemplated related primarily to export inspection and warehousing and were not considered to give a power to burden the flow of foreign commerce.[35] (4) It seems to have been contemplated even at that time that this Court would have power to set aside state statutes which infringed the clause.[36]

3. Appellants, however, challenge the power of this Court to declare invalid an improper inspection law. This challenge, of course, cannot reach the power of the Court under the commerce clause, which we have discussed in the preceding point. But it is unfounded even under the imports clause.

The Court has twice noted the suggestion of Justice Bradley, sitting on circuit, that Congress had exclusive power to annul improper inspection laws.[37] But, even in these cases it has proceeded to examine the validity of the inspection laws on

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[35] An elaborate list of state inspection laws in force before and shortly after the adoption of the Constitution is found in *Turner* v. *Maryland*, 107 U. S. 38, 51–54; it supplements a list contained in the argument of counsel in *Gibbons* v. *Ogden*, 9 Wheat. 1, 119–123.

[36] Madison's statement to that effect, it is true, was made before insertion of the provision that Congress should have power to revise and control the inspection laws. But it is hardly to be thought that this additional safeguard eliminated one already present.

[37] *Neilson* v. *Garza*, 17 Fed. Cas. No. 10,091 (C. C. E. D. Tex.); noted in *Turner* v. *Maryland*, 107 U. S. 38, 55; *Patapsco Guano Co.* v. *North Carolina*, 171 U. S. 345.

their merits. Not since *Brown* v. *Maryland,* 12 Wheat. 419, could it be doubted that the power of Congress to control state imposts and duties did not exclude this Court, in the silence of Congress, from declaring them illegal.[38] The Court has in several cases considered and answered on the merits arguments that inspection laws were invalid under the imports clause,[39] and in *People* v. *Compagnie Generale Transatlantique,* 107 U. S. 59, it declared invalid a law for the inspection and health regulation of immigrants, coupled with a fee, as an improper inspection law. If more be needed, it is sufficient to note that the Court has pointed out that the problems of judicial review under the imports clause are substantially the same as those under the commerce clause,[40] where this Court has undoubted power to declare void an inspection law relating to interstate or foreign commerce.[41]

It seems plain enough, therefore, that the Court in the silence of Congress has full power to strike

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[38] See *Low* v. *Austin,* 13 Wall. 29; *Cook* v. *Pennsylvania,* 97 U. S. 566; *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292; *Anglo-Chilean Corp.* v. *Alabama,* 288 U. S. 218.

[39] *Cooley* v. *Board of Wardens,* 12 How. 299, 314; *Turner* v. *Maryland,* 107 U. S. 38; see *Foote* v. *Maryland,* 232 U. S. 494, 503.

[40] *Great Northern Ry.* v. *Washington,* 300 U. S. 154, 164; *Foote* v. *Maryland,* 232 U. S. 494, 504; *Anglo-Chilean Corp.* v. *Alabama,* 288 U. S. 218, 225; *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292, 296; see *Patapsco Guano Co.* v. *North Carolina,* 171 U. S. 345, 351.

[41] See *supra,* pp. 20–22, 25.

down the Florida statute under the imports clause as well as under the commerce clause. We submit that the power should here be exercised to declare the statute invalid under both clauses because it is discriminatory and because the fees are excessive.

4. We have shown that the statute is discriminatory and that it is accordingly invalid under the commerce clause (*supra*, pp. 13–24). By the same token, its discrimination against foreign commerce takes it outside the exemption for inspection laws which is found in the imports clause.

On principle, it is clear that discriminatory inspection laws are a contradiction of the purposes of the Constitution. By this device, quite as effectively as by direct tariff legislation, the States would have full power to stifle foreign commerce and to develop their own protected industries. The present case offers an illuminating example. The Tariff Act of 1930 imposed a duty on cement of 6 cents per 100 pounds (19 U. S. C. Sec. 1001, par. 205b). On May 1, 1935, this duty was reduced to 4½ cents pursuant to the Belgian Trade Agreement; Belgium, in return for this and other concessions, granted reduced duties and other valuable advantages with respect to exports from this country (49 Stat. 3680, 3691, 3717). On June 5, 1937 the Florida statute was enacted, and imposed an inspection fee of 15 cents per 100 pounds on foreign cement. If it were sustained, it is clear

enough that the several States could be the ultimate arbiters of the national tariff policy.

A nondiscriminatory inspection statute, on the other hand, imposes no such obstacle to foreign trade. Foreign and domestic cement could still compete in the Florida markets, each in relation to the other unaffected by the cost of the inspection fees, which would burden the competitors equally. Neither could so substantially undersell the other as to drive it out of the market. The price of cement would probably have to be raised, but any diminution in the market would affect foreign and domestic cement equally.

This Court has never considered a discriminatory inspection law under the imports clause. But in *Brown* v. *Maryland,* 12 Wheat. 419, it declared a discriminatory license tax on importers to be invalid under that clause, although the opinion of Chief Justice Marshall did not go on the ground of discrimination.[42] *Cook* v. *Pennsylvania,* 97 U. S. 566, held invalid a gross receipts tax directed at the proceeds of the sale of foreign goods at auction; the opinion rests at least in part on the discriminatory nature of the tax. The Court said (p. 573):

> If a tax assessed by a State injuriously discriminating against the products of a State

[42] A dissenting opinion has since explained the case in terms of discrimination. *Anglo-Chilean Corp.* v. *Alabama,* 288 U. S. 218, 238 (per Cardozo, J., Brandeis and Stone, J. J., concurring); the majority opinion did not differ on this point.

> of the Union is forbidden by the Constitution, a similar tax against goods imported from a foreign State is equally forbidden.

And in *Voight* v. *Wright*, 141 U. S. 62, the Court seems to have treated a statute discriminating against interstate commerce as presenting a question under the imports clause and held (p. 66) that "without passing on the general right of the State to inspect imports * * * the law in question is a discriminating law" and therefore invalid.

Finally, as indicated in the quotation from the *Cook* case, the cases which invalidate an inspection law which discriminates against interstate commerce (*supra*, pp. 20–22) are equally applicable under the imports clause. Its prohibitions are stricter than those of the commerce clause (*supra*, p. 27), and the rule against discrimination, since there are the same imperative reasons of policy, would apply *a fortiori* under the imports clause.

5. The second reason why the Florida statute is invalid under the imports clause is that its inspection fees are unreasonably high. We have shown that they must be taken to be from 60 to 600 times the cost of inspection, and that their excessive nature is sufficient to prevent them from being saved by the exception of inspection fees from the prohibitions of the commerce clause (*supra*, pp. 24–26). Again, that rule must apply *a fortiori* in the case of foreign commerce, for the Constitution expressly limits the allowable inspection fees to those that are "absolutely necessary."

It is no answer to say that, under the terms o
the imports clause, the excess will be paid into th
Treasury of the United States. That provision wa
inserted, as we have shown (*supra,* pp. 28–29), no
to constitute an authority for excessive fees, in con
tradiction to the other requirements of the clause
but to provide an additional safeguard against th
day when Congress might consent to the states lay
ing imposts or duties.

We advance this ground of invalidity under th
imports clause, and the related ground under th
commerce clause (*supra,* pp. 24–26) in order to af
ford this Court the benefit of a full analysis of th
issues presented. However, we wish to add tha
from the point of view of the national interests o
the United States—the basis for our participatio
in the presentation of this cause—the significan
question here involved is the power of the States t
control foreign commerce for sectional purposes i
a manner not contemplated by the Constitution
Although a fee largely in excess of the cost of in
spection is naturally more burdensome than a mor
moderate one, the factors which determine competi
tive advantages in commerce are in no way relate
to the expenditures required to carry out particula
types of inspection. On the other hand, any fee
whether or not immoderately high, which is appli
cable only to imports may in many cases disrup
commerce. Furthermore, the delays and uncer

tainty necessarily attendant upon determining the reasonableness of charges by the uncertain results of specific Federal judicial decisions [43] would themselves constitute an undue burden on our foreign trade.

6. Finally, it may not be amiss to mention cases which have intimated that a valid inspection statute must be enacted *bona fide*, and not as a pretext to accomplish forbidden results. See *People* v. *Compagnie Generale Transatlantique*, 107 U. S. 59, 63; *Railroad Co.* v. *Husen*, 95 U. S. 465, 473; *Postal Telegraph-Cable Co.* v. *Taylor*, 192 U. S. 64, 72. The rule has been applied in cases which are perhaps more debatable than that presented here. But it is a dangerous doctrine which rests decision upon speculation as to the motives of a legislature. Particularly with a record so unsatisfactory as the present, we wish expressly to disclaim reliance upon standards so intangible as the supposed state of mind of the legislature.

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[43] The telegraph license and inspection cases, under the commerce clause, offer an apt example of the vagaries of juries, counsel and courts on this question. A fee of $1 per pole and $2.50 per mile was held valid in *Western Union Tel. Co.* v. *New Hope*, 187 U. S. 419. The same fee was held invalid in *Atlantic and Pacific Tel. Co.* v. *Philadelphia*, 190 U. S. 160; *Postal Telegraph-Cable Co.* v. *New Hope*, 192 U. S. 55; and *Postal Telegraph-Cable Co.* v. *Taylor*, 192 U. S. 64. A fee of $2 per pole, apparently substantially higher, was held valid in *Postal Tel.-Cable Co.* v. *Richmond*, 249 U. S. 252.

CONCLUSION

The court below had jurisdiction to entertain this action, and the challenged statute is an undue and discriminatory burden on foreign commece. It is, therefore, respectfully submitted that the decision of the court below should be affirmed.

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FEBRUARY 1939.

APPENDIX

Florida Laws of 1937, Senate Bill No. 760; Chapter 18995 of Acts of 1937; Comp. Gen. Laws of Florida, ch. CVIII, secs. 4151 (512)–(519):[1]

"AN ACT Providing for the Fixing of a Minimum Standard for all Cement Offered for Sale, Sold or Used in the State of Florida and to Authorize and Empower the State Road Department of the State of Florida to Write Rules and Regulations for the Effectual Enforcement of this Act; Providing for the Inspection of all Cement Imported and Brought into the State of Florida from any Foreign Country and Providing for an Inspection Fee to be Paid for the Inspection of all Cement Imported and Brought into the State of Florida from any Foreign Country and Offered for Sale, Sold, or to be Used in the State of Florida; Providing Penalties for the Violation of any of the Provisions of this Act as well as any Rule or Regulation Promulgated by the State Road Department; and Providing for the Enforcement of the Provisions of and Regulations made in Pursuance of this Act.

"WHEREAS, during the past twelve months approximately thirty per centum (30%) of all cement sold and used in Florida was

[1] The statute has not been printed in the official session laws. The version given by the Supreme Court in *State* v. *Hale*, 129 Fla. 588, 591–594, does not wholly agree with that of the Compiled General Laws. We have, accordingly, adopted the version used in the brief of the Attorney General of the State.

manufactured in foreign countries and imported and brought into the State of Florida, and,

"WHEREAS, in view of the fact that large numbers of dwellings, apartment houses, hotels and public buildings are constructed of cement or cement forms an integral part of the construction thereof, and,

"WHEREAS, it is of paramount importance to the public safety that only cement measuring up to a minimum standard should be offered for sale, sold or used in the State of Florida, and,

"WHEREAS, much of the foreign manufactured cement imported and brought into the State of Florida has been of inferior quality, and

"WHEREAS, the importation and sale or use of foreign cement not only jeopardizes public safety but amounts to unfair competition being forced on this great industry in Florida,

"THEREFORE:"

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF FLORIDA:

SECTION 1. That the State Road Department of the State of Florida is hereby authorized and required to fix a minimum standard for all cement offered for sale or sold or used in the State of Florida: said standard to be fixed by said State Road Department shall be the standard now in force and used by it in the purchase and use of cement in the construction of public highways which said standard of cement was set up by the American Society of Testing Materials and approved by the United States Bureau of Public Roads for highway construction; and said standard is hereby fixed

and designated as a minimum for all cement offered for sale or sold or used in the State of Florida and it shall be unlawful for any person, persons, association of persons, firm or corporation to sell, offer for sale or use in the State of Florida any cement in the construction of any hotel, apartment house, rooming house, dwelling or public building of any kind or character which does not measure up to the minimum standard herein fixed.

SEC. 2. It is hereby made the duty of the State Road Department to inspect all cement imported or brought into the State of Florida from any foreign country and sold or offered for sale or to be used in the State of Florida, and no cement imported and brought into the State of Florida from any foreign country shall be sold, offered for sale or used in the State of Florida until the same has first been inspected by the State Road Department and a tag or other evidence showing such inspection shall be affixed to said cement, or the container thereof, showing that it has been so inspected or approved; and it shall be unlawful for any person, firm, association of persons, or corporation to sell, offer for sale or use in the State of Florida any cement imported or brought into the State of Florida from any foreign country before such inspection has been made by the State Road Department and such cement approved as herein set out and until there has been paid an inspection fee to the State Road Department of fifteen cents (15¢) on each one hundred pounds or fraction thereof; said fee so required to be paid for inspection of cement manufactured in a foreign country and imported and brought into the State of Florida shall be paid to the State Road Department and said

inspection fee is required to be paid as inspection fees on cement imported and brought from foreign countries into the State of Florida.

SEC. 3. The State Road Department is hereby authorized to employ all field and other agents and clerical assistance at such times and periods as may enable it to enforce the provisions of this Act, and is hereby authorized to fix their compensation and said State Road Department is hereby authorized to purchase and install such facilities from time to time as it may deem necessary to make fully effectual the provisions of this Act. The State Road Department shall use and expend in enforcing this Act only monies derived and collected hereunder.

SEC. 4. Said State Road Department is hereby authorized and empowered to promulgate any and all reasonable rules and regulations that it may deem necessary and proper for the proper administration and enforcement of this Act and said rules and regulations shall have the force and effect of law.

SEC. 5. It shall be unlawful for any person to obstruct or resist any authorized agent or inspector designated by the State Road Department while such person is in the performance or discharge of any duty imposed upon, authorized or required under the provisions of this Act, or by any rule or regulation adopted as provided hereunder.

SEC. 6. Any person who shall violate any of the provisions of this Act or shall do or commit any act herein declared to be unlawful or violate any rule or regulation made or promulgated by the State Road Department by virtue of the authority herein, shall be punished by a fine of not more than $2500.00. or imprisonment in the county jail for not

more than 12 months, or both in the discretion of the court.

SECTION 7. This law shall be construed as an Act intending to secure public safety of the people of the State of Florida.

SECTION. 8. The State Road Department is hereby authorized to designate and utilize the services of the several officers and inspectors of the Health Department, Hotel Commission of the State of Florida, as well as any and all other duly authorized and legally constituted officials who are vested with police power, in order to enforce and carry out the provisions of this Act in all particulars, and it shall be the duty of all such inspectors and other officials to comply with the orders and requests of said Road Department in connection with the enforcement of this Act, without any additional compensation than that already being paid such inspector or officials, and refusal so to do on the part of any inspector or official shall constitute legal and sufficient grounds for removal from office.

SECTION 9. In addition to other remedies provided for in this Act, the State Road Department is hereby authorized to proceed in any of the courts of this State by injunction to restrain any threatened continued violation of this Act, and it shall be the duty of each State Attorney, County Prosecuting Attorney, and of the Attorney General, to assist in the enforcement of the provisions of this Act upon the request of the State Road Department.

SECTION 10. All laws and parts of laws in conflict with the provisions of this Act, be and the same are hereby repealed.

SECTION 11. This Act shall take effect upon its becoming a law.

U. S. GOVERNMENT PRINTING OFFICE: 1939

SUPREME COURT OF THE UNITED STATES.

No. 418.—October Term, 1938.

A. B. Hale, as Chairman, and E. A. McColskey et al., etc., Appellants,
vs.
Bimco Trading, Inc., and Broward County Port Authority.

On Appeal from the District Court of the United States for the Northern District of Florida.

[February 27, 1939.]

Mr. Justice Frankfurter delivered the opinion of the Court.

The case is here on appeal, under Section 266 of the Judicial Code (28 U. S. C. § 380), to review the final decree of a three-judge District Court enjoining appellants, constituting the State Road Department of Florida, from enforcing against appellees relevant provisions of a Florida statute. Acts 1937, c. 18995, Fla. Comp. Gen. Laws, c. CVIII, § 4151 (512)-(519). The statute provides for the inspection of all imported cement and the payment for such inspection of a fee of fifteen cents per hundred pounds. A motion to dismiss the bill having been overruled and appellants having elected to stand on the bill, a final decree was duly entered.

At the threshold, a challenge to the jurisdiction of the District Court must be met. It derives from Section 265 of the Judicial Code (28 U. S. C. § 379), for it is claimed that the injunction in effect stayed proceedings in the Supreme Court of Florida. Disposition of this claim entails a quick narrative of the course of litigation disclosed by the record.

On July 29, 1937, a petition for mandamus was filed in the Supreme Court of Florida by the State of Florida ex rel. Florida Portland Cement Company to compel appellants, members of the State Road Department, to enforce the statute in question, and on the same day an alternative writ of mandamus was issued. Appellants' demurrer, raising the constitutionality of the statute, was overruled on October 12, 1937. *State* v. *Hale*, 129 Fla. 588. A peremptory writ of mandamus, on November 17, 1937, directed appellants to enforce the statute. Meanwhile, on November 4, 1937, appellee Bimco Trading, Inc. filed its bill of complaint in this suit to enjoin the enforcement of the statute as forbidden, *inter alia*,

by Article I, § 8, cl. 3, and Article I, § 10, cl. 2, of the Constitution. On November 27, 1937, the District Court granted an interlocutory injunction restraining appellants from enforcing the statute. Thereafter, appellants moved the Supreme Court of Florida to stay the mandamus proceedings pending an appeal to this Court from the order of the District Court, and on December 9, 1937, the Florida court ordered "that all further proceedings and actions taken pursuant to the peremptory Writ of Mandamus heretofore issued in this cause, be and the same is hereby stayed until the final decision of the Supreme Court of the United States upon the constitutionality of the act involved in this cause and until the further order of this Court." This cause was then prosecuted with dispatch. On March 8, 1938, appellants' motion to dismiss, which had been filed on November 24, 1937, was overruled, and, appellants refusing to plead over, the District Court, on June 14, 1938, entered a final decree permanently enjoining the enforcement of the statute.

To invoke Section 265 in these circumstances is to assert that a successful mandamus proceeding in a state court against state officials to enforce a challenged statute, bars injunctive relief in a United States district court against enforcement of the statute by state officials at the suit of strangers to the state court proceedings. This assumes that the mandamus proceeding bound the independent suitor in the federal court as though he were a party to the litigation in the state court. This, of course, is not so. *Chase National Bank* v. *Norwalk,* 291 U. S. 431, 441.

Appellants are in effect contending that no proceedings are here available to bring the constitutionality of the Florida statute before this Court, once the state court directed its enforcement. The Supreme Court of Florida itself manifested no such strangling conception of Section 265. It did not deem the proceedings initiated below as a denial of the right of way of a state court through an obstructive exercise of authority by a United States court. On the contrary, in staying "all further proceedings and actions" until this Court had finally passed upon its constitutionality, the Supreme Court of Florida recognized the propriety of the present proceedings as an orderly mode for invoking the ultimate judicial voice on constitutional issues. Therefore, Section 265 has no relevance here. That provision is an historical mechanism (Act of March 2, 1793, 1 Stat. 334, 335) for achieving harmony in one phase of our complicated federalism by avoiding needless

friction between two systems of courts having potential jurisdiction over the same subject-matter. *Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175, 183. The present record presents no occasion for bringing this safeguard into play.

We turn, therefore, to the merits.

After reciting that "during the past twelve months approximately thirty per centum (30%) of all cement sold and used in Florida was manufactured in foreign countries and imported"; that cement is "an integral part of the construction" of "large numbers" of buildings; that "much of the foreign manufactured cement . . . brought into the State of Florida has been of inferior quality"; that "the importation . . . and use of foreign cement not only jeopardizes public safety but amounts to unfair competition being forced on this great industry in Florida", the legislature of that State, in 1937, enacted the statute in controversy. Section 1 authorizes the State Road Department of Florida "to fix a minimum standard for all cement offered for sale or sold or used" within the State. Section 2 enforces obedience to standards of quality thus to be set by the Department by provisions for inspection and for exaction of an inspection fee of fifteen cents per hundred weight. It is this section which gives the statute teeth. But this section—the scheme for inspection and for the inspection fee—applies only to "cement imported or brought into the State of Florida from any foreign country . . . ." The statute thus renders the 70% domestic cement immune from its requirements of inspection and its attendant fee. According to the uncontested allegation of the bill of complaint, this inspection fee is "sixty times the actual cost of inspection." Apart from this allegation, the Government, appearing as *amicus* and more particularly on behalf of the national interest represented by the Trade Agreements Act (48 Stat. 943; 19 U. S. C. § 1351), gives perspective to the size of the fifteen cent fee by comparing it with the duty of six cents per one hundred pounds fixed by the Hawley-Smoot Act of 1930 (46 Stat. 590, 602; 19 U. S. C. § 1001, par. 205(b)), and with the duty of four and one-half cents fixed by the Belgian Trade Agreement of 1935 (49 Stat. 3680, 3691; 19 U. S. C. § 1351).

As grounds for this discrimination in the incidence of an obviously onerous exaction as between foreign and domestic cement, the preamble of the statute states that "it is of paramount importance

to the public safety that only cement measuring up to a minimum standard should be offered for sale, sold or used in the state of Florida," and that the importation "amounts to unfair competition being forced on this great industry in Florida." So far as public safety demands certain standards in the quality of cement, such safety is dependent on assurance of that quality by appropriate inspection no less of the 70% domestic cement than of the 30% obtained from abroad. That no Florida cement needs any inspection while all foreign cement requires inspection at a cost of fifteen cents per hundred weight is too violent an assumption to justify the discrimination here disclosed. The other justification—the competitive effect of foreign cement in the Florida market—is rather a candid admission that the very purpose of the statute is to keep out foreign goods. The Supreme Court of Florida gives no reason resting in local conditions for what appears to be a transparent discrimination in the imposition of heavy inspection fees as between imported and domestic cement, and none has been offered by appellants. The context of a particular statute may justify distinctive treatment of phases of interstate or foreign commerce. The circumstances may negative apparent discrimination in the difference of treatment. Such was the situation in *McLean* v. *Denver & Rio Grande R. R. Co.*, 203 U. S. 38, referred to by the Florida Supreme Court. But this is not that kind of a case. According the statute every presumption of validity, no reasonable conjecture can here overcome the calculated discrimination against foreign commerce.

Such assumption of national powers by a state has, ever since March 12, 1827 (*Brown* v. *Maryland*, 12 Wheat. 419), been found to be in collision with the Constitution. It can never be pleasant to invalidate the enactment of a state, particularly when it bears the imprimatur of constitutionality by the highest court of the state. But it would not be easy to imagine a statute more clearly designed than the present to circumvent what the Commerce Clause forbids. *Cook* v. *Pennsylvania*, 97 U. S. 567; *Voight* v. *Wright*, 141 U. S. 62. This makes it unnecessary to consider the objections urged under Article I, § 10, cl. 2.

The decree of the District Court is

Affirmed.